SERVED: April 17, 1995

NTSB Order No. EA-4342

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of March, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JOHN FRANCIS ROURKE, Respondent.	Docket NA-3

OPINION AND ORDER

Respondent has appealed from an order issued by Administrative Law Judge William E. Fowler, Jr., on September 29, 1994, dismissing his appeal from a 1986 order of revocation under the doctrine of res judicata because all of the issues raised in this proceeding were previously disposed of in Administrator v. Rourke, NTSB Order No. EA-4186 (1994).[1] As discussed below, we deny respondent's appeal and affirm the law judge's dismissal and termination of this action.

[1] A copy of the law judge's order of dismissal is attached.

This proceeding represents the second time respondent Rourke has attempted to bring before us his challenges to a 1986[2] order of the Administrator which revoked his airline transport pilot certificate and his mechanic certificate pursuant to 14 C.F.R. 61.15(c) and 65.12(c), based on his conviction on October 26, 1984, for conspiracy to distribute marijuana. In both Board proceedings, respondent has challenged the revocation order on essentially the same grounds, arguing: 1) that respondent was assured, in connection with his guilty plea in the drug case, that no certificate action would be taken against his certificate; 2) that he was never properly served with a notice of proposed certificate action; and 3) that no explanation of appeal rights was enclosed with the order of revocation he ultimately received.

Respondent's first challenge before the Board, raised some six years after the order of revocation was issued, was initiated by respondent's written request to the FAA that the revocation order be rescinded. That request was refused, and respondent appealed that refusal to the Board. Although the case was originally docketed as a certificate denial action pursuant to section 602 of the Federal Aviation Act [now recodified as 49 U.S.C. 44703], we construed respondent's challenge as an appeal

[2] The revocation order is dated July 18, 1986. It was sent by certified mail to respondent's then address of record, but was returned "addressee unknown." It was then remailed by regular mail on September 4, 1986, to respondent at his place of incarceration. That respondent received the order is evident from his letter to the FAA dated November 20, 1986, responding to the order.

under section 609 [now recodified as 49 U.S.C. 44709], and dismissed the appeal as untimely. We rejected respondent's arguments in that case -- substantially the same as those made in the instant proceeding[3] -- and found he had shown no good cause for allowing an appeal some six years after his actual receipt of the order of revocation. Administrator v. Rourke, NTSB Order No. EA-4186 (1994) ("Rourke I").

Respondent's second challenge to the 1986 order of revocation -- the subject of this proceeding -- was initiated by his motion to this Board, filed November 15, 1993, seeking leave to file a delayed appeal of the 1986 revocation order.[4] In that motion, which was filed while his appeal from the law judge's initial decision in Rourke I was pending before us, respondent again argued that good cause existed for acceptance of an appeal at that late date. After we issued our final decision in Rourke I, the law judge denied respondent's motion in this proceeding on the grounds that it was barred by the doctrine of res judicata. We agree.

The issue of whether good cause exists for respondent's untimely appeal of the 1986 revocation order has already been

[3] The only additional argument respondent makes in this proceeding is that the order of revocation lacked a certificate of service. While the lack of a certificate of service might have been relevant in determining the issuance date of the order and, consequently, when the 20-day time period for appealing expired, it was no longer relevant six years after respondent's admitted receipt of the order.

[4] The motion was accompanied by a notice of appeal, and a request for extension of time to perfect the appeal.

decided. Contrary to respondent's assertion that he has presented information in this proceeding relating to good cause that has not previously been considered by the Board, his arguments are substantially the same as those already rejected. Respondent is not entitled to a reconsideration of the issues already decided. Nor is he entitled to our consideration of new or expanded arguments on the issues he addressed, or had an opportunity to address, in Rourke I.

Nonetheless, we note that we would not find respondent's timeliness arguments[5] persuasive, even if they were properly before us in this proceeding. His non-receipt of the notice of proposed certificate action has no bearing on whether we should accept his untimely appeal from the order of revocation, which he admits he received. And, even assuming respondent's alleged failure to receive a detailed written explanation of his appeal rights along with the 1986 order of revocation might have provided good cause for some delay in appealing, it does not provide good cause for his six-year delay in appealing. The omission of appeal rights, if there was one, should have been apparent to respondent -- and thus subject to reasonably prompt correction -- since the order indicates on its face that an "appeal sheet" is enclosed. Moreover, respondent's general right to appeal to the NTSB is also set forth in section 609 of the

[5] Respondent's other argument, that the government purportedly agreed not to pursue certificate action based on the drug conviction, is a matter we could only consider in connection with a timely appeal.

Federal Aviation Act [now recodified as 49 U.S.C. 44709], which was cited in the order as the authority for the FAA's action.

In sum, respondent has shown no reason to overturn the law judge's order dismissing and terminating this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The order dismissing respondent's appeal and terminating this proceeding is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.